

# STANDING TO CLAIM PRIVILEGES IN OHIO

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The problem to be treated in this article can be easily described by means of an illustration. In litigation between *A* and *B*, *A* calls upon *W*, a witness who is not a party, to testify to a matter which by definition we shall say would tend to incriminate *W*, or which by definition we shall call a "privileged" communication made by *W* to his lawyer, or his physician, or his wife. In every other respect the testimony called for is unobjectionable. *W* protests that he should not be required to answer, correctly stating the reason; and *B*, who does not wish the testimony to be part of *A*'s case against *B*, urges that *W*'s position is correct. The question whether the matter fits the definition of privilege turns out to be a difficult one; and the trial judge makes an understandable error, which we might have made if we did not control the defining process. The judge rules (incorrectly) that no privilege applies, and orders *W* to answer. Confronted with possible contempt proceedings, *W* complies, and the evidence is received. A rule of evidence has been "broken," and *W*'s privilege has been violated. Again by definition, the result is that *B* loses the case. The question to be considered here is whether *B* has been deprived of any of *B*'s rights or privileges.

The Ohio answer to the question appears to be "sometimes"; and after analysis of the principles involved, a comparison with selected Ohio precedents will be attempted, with some references to results in other jurisdictions.

For many years, textwriters have separated the rules of evidence into broad categories based on differences in function. The great bulk of evidence law consists of rules of exclusion such as the requirement of relevancy, the requirement of first-hand knowledge, and the hearsay rule. The underlying purpose of all these is the same. They are intended to aid in the ascertainment of truth at the trial by allowing the litigant to protect himself against the admission and use by the jury of evidence which is insufficiently reliable, or is prejudicial, or tends to delay or confuse. Evidence of these kinds is excluded because it would hinder rather than help the jury in its task of finding correct answers to the factual questions posed to it.

In addition and in contrast to these rules, analysts place rules of privilege, such as those concerning self-incrimination, or concerning

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communications between attorney and client, or physician and patient. Again, the distinction is based on underlying purpose. It is conceded on all hands that the evidence rejected by such rules is not less reliable than what is admitted, nor more productive of prejudice or delay or confusion. The privilege shuts the door on truth rather than on untruth. The justification for such exceptions to the general compellability and reception of material tending to throw light on the issues is found in a different direction. In each case, the reason is thought to lie in an "outside" interest—outside in the sense that it is unconnected with the reliability of the evidence and with the interests at stake in the trial.<sup>1</sup> In the case of the physician-patient privilege, for example, the outside interest is correct diagnosis and cure through willing submission by the patient to thorough examination and through free and frank disclosure of the necessary history. The subsequent rejection of this material at trial, if the patient wishes, is thought to be a reasonable price to pay for the earlier encouragement and attendant improvement in health.

The treatise-writers have not conceded the correctness of these assumptions about human nature,<sup>2</sup> but they have carried them forward into an analysis of rules of privilege consistent with the function of protecting this outside interest. This analysis runs as follows: since privileges constitute an exception to the general rule that all material evidence is compellable to ascertain the facts at issue, privileges should be narrowly construed.<sup>3</sup> This means that they should be held to the minimum scope necessary for adequate protection of the outside interest involved. This leads to the conclusion that ordinarily a privilege is "personal"—that is, it exists for the benefit, and solely for the benefit, of the person or persons having that outside interest. Such a person is the holder of the privilege, and only *he* can claim its enforcement as a matter of right since it is only *his* outside interest that is intended to be protected by it. A litigant, as litigant, has a right to the enforcement of the rules of exclusion which are designed to guard the ascertainment of the truth of his claim or defense, but only the holder of the privilege has a right to the enforcement of a rule of privilege.<sup>4</sup>

In the abstract, this description is accepted by the writers, but the procedure for its implementation has not received equal attention

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<sup>1</sup> See McCormick, Evidence § 72 (1954) [hereinafter cited as McCormick]; 8 Wigmore, Evidence § 2196 (McNaughton Rev. 1961) [hereinafter cited as Wigmore].

<sup>2</sup> Morgan, *Foreword* to Model Code of Evidence 22 (1942); McCormick §§ 81, 90, 91, 101, 108; 8 Wigmore § 2380.

<sup>3</sup> See *In re Story*, 159 Ohio St. 144, 111 N.E.2d 385 (1953).

<sup>4</sup> 8 Wigmore § 2196.

and has given rise to the difficulties which are the subject of this article.

One thoroughly worked-out effort to formulate a procedure for resolving questions regarding who may assert privileges, applying in part the principles stated above, is found in the Uniform Rules of Evidence proposed by the Commissioners on Uniform State Laws.<sup>5</sup> The privileges which will be used are those involving self-incrimination, communications between attorney and client, physician and patient, and husband and wife. Only the portion of a Rule pertinent to the question of standing to assert a privilege will be reproduced.

Rule 7 states the general duty to give evidence: "Except as otherwise provided in these Rules, . . . no person has a privilege to refuse to be a witness, and . . . no person has a privilege to refuse to disclose any matter . . . and no person has a privilege that another shall not be a witness or shall not disclose any matter. . . ."

Rule 25: ". . . [E]very natural person has a privilege, which he may claim, to refuse to disclose in an action . . . any matter that will incriminate him. . . ."

Rule 26, dealing with the attorney-client privilege, provides that ". . . the client has a privilege (a) if he is the witness to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it . . . ."

"The privilege may be claimed by the client in person or by his lawyer, or if incompetent, by his guardian, or if deceased, by his personal representative."

Rule 27 creates the physician-patient privilege. The Commissioners first decided not to include it, but reversed that decision and adopted the privilege as stated in the American Law Institute's Model Code, so that the format differs slightly from the other Rules. Rule 27 defines the "holder of the privilege" as the patient while alive and his personal representative after death, and then provides that "a person, whether or not a party, has a privilege . . . to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that . . . the claimant is the holder of the privilege or a person authorized to claim the privilege for him."

Rule 28, dealing with confidential communications between persons married to each other, provides that ". . . a spouse who transmitted to the other the information which constitutes the communication" has a privilege "which he may claim whether or not he is a party to the action, to refuse to disclose and to prevent the other from

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<sup>5</sup> Handbook of the National Conference of Commissioners on Uniform State Laws 161 *et seq.* (1953).

disclosing communications . . . made in confidence between them while husband and wife. The other spouse or the guardian of an incompetent spouse may claim the privilege on behalf of the spouse having the privilege." Rule 23 states a similar privilege for the spouse who is the accused in a criminal case.

Rule 40: "A party may predicate error on a ruling disallowing a claim of privilege only if he is the holder of the privilege." These Uniform Rules on privilege have been adopted in substance in New Jersey; Rule 40 was enacted verbatim.<sup>6</sup>

On the points to be considered here, the Commissioners' commentary on the Rules does not supply illustrations. With the caveat that they represent the writer's interpretation, we should expect that the Rules would apply in the manner set out in the following examples, for the reasons given.

*Illustration 1:* In an action between *A* and *B*, *W* is called upon by *A* as a witness to testify to a confidential communication made by *W* to *W*'s physician for purposes of treatment. Under Rule 27, *W* has a privilege to refuse. If, therefore, the trial judge sustains *W* in his refusal, *W*'s privilege has been recognized, and no right of *A* to compel evidence in his cause has been denied.

*Illustration 2:* In the situation in Illustration 1, if the judge erroneously orders *W* to testify and for that reason alone *W* does so, no right of *B*, who may have wished the testimony excluded, has been violated. Under Rule 40, *B* cannot predicate error upon the ruling. Whether *W*'s failure to stand upon his refusal and test the judge's ruling in a contempt proceeding is a waiver of *W*'s privilege is not material, since *B* has no legal interest in the protection of *W*'s privilege nor in the failure to protect it.

*Illustration 3:* In a lawsuit between *A* and *B*, *A* calls upon *B* as a witness to testify to a communication made by *B* to *B*'s physician, confidentially and for purposes of treatment. *B* has a privilege to refuse; and if the judge sustains him in his refusal, no right of *A* to compel testimony has been denied.

*Illustration 4:* In the situation in Illustration 3, if the judge erroneously orders *B* to testify over his claim of privilege, *B* may stand upon his refusal, and test the ruling in the ensuing contempt proceeding. This parallels Illustration 2, except that (1) *B* has a legal interest in the contempt proceeding which is distinct from his interest in the main action between himself and *A*; and (2) whether *B*'s failure to

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<sup>6</sup> N.J. Rev. Stat. § 2A:84A-19 to -32 (Supp. 1962). The Uniform Rules on these privileges have also been enacted in substance in the Virgin Islands. V.I. Code tit. 5, §§ 853-856 (1957). Rule 40 was enacted verbatim, V.I. Code tit. 5, § 866 (1957).

stand upon his refusal constitutes a waiver of his privilege must be decided. By implication, Rule 40 suggests that since *B* is a party, he may predicate error in the main action upon the judge's ruling, and that would include the notion that *B*'s failure to stand out, after the judge ruled, was not a waiver of his privilege.<sup>7</sup>

*Illustration 5:* In a lawsuit between *A* and *B*, *A* calls upon *W*, *B*'s physician, to testify to a confidential communication made by *W* to *B* for purposes of treatment. Under Rule 27, *B* has a privilege to prevent *W* from disclosing. If *B* claims it, and the judge sustains him, *B* has prevented *W* from testifying as *B* is privileged to do, and no right of *A* to compel testimony has been denied.

*Illustration 6:* In the situation in Illustration 5, if the judge erroneously orders *W* to testify over *B*'s claim of privilege, and *W* obeys,

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<sup>7</sup> On strict extension of the principle, the procedure to test the privilege is separate from the main action. It should always be carried up from the trial judge's ruling through contempt action; and this would dictate the conclusion that failure to stand on the refusal to disclose terminates the matter, so far as the main action is concerned. See *Frazer v. United States*, 145 F.2d 139, 144 (6th Cir. 1944), where the court said:

... Frazer, on the other hand, claimed the privilege, but when directed to answer, complied without further protest. Had he persisted in his refusal to answer, it would, of course, have been at the hazard of being cited and punished for contempt, but in the event of punishment he would not have been without remedy and might have challenged the action of the court by petition for writ of habeas corpus, or by an appeal from the contempt order. He declined the hazard. May it thus not be said that though first invoking the privilege he ended by waiving it? We think this is a logical conclusion.

See also *Brown v. St. Paul City Ry.*, 241 Minn. 15, 31, 62 N.W.2d 688, 699 (1954): "Once the privileged matter is produced after objection has been overruled, the question of correctness of the ruling is moot on appeal."

See also 8 Wigmore § 2270:

Where the complaining party is *not* the wronged witness, the party has no ground for complaint. Where the party *is* the wronged witness, it is arguable that the same result should follow—that the party witness should not be permitted, for the purpose of overthrowing the proceedings in the cause, to complain of error in denying his privilege. The reasoning is that his privilege as a witness is totally unrelated to his rights as a party, and that the result of the litigation between the parties should not be distorted by the irrelevant fact that the witness whose privilege was erroneously denied happened to be one of the parties. No court has accepted this conclusion, however.

McCormick makes the same point, but ends by saying: "If the adverse party to the suit is likewise the owner of the privilege, then, while it may be argued that the party's interest as a *litigant* has not been infringed, most courts decline to draw so sharp a line, and permit him to complain of the error." McCormick § 73.

The authors of Model Code of Evidence rule 234, which is identical with Uniform Rule 40, expressly stated that the holder of the privilege could claim error on its denial if he were a party. Model Code of Evidence 173 (1942).

*B*'s privilege to prevent *W* from testifying has been violated, and under Rule 40, *B* may predicate error on the ruling.

*Illustration 7:* If, in the situation of Illustrations 5 and 6, the suit is between *A* and *X* (*B* is not a party): *B*, if present, may claim his privilege; if *B* is not present, *W* is authorized to claim the privilege on behalf of *B*. If the judge sustains the claim, no right of *A* to compel testimony has been denied. If the judge erroneously orders *W* to testify and *W* obeys, *B*'s privilege has been violated, but *B* has no remedy. No right of *X*, who may have wished the testimony excluded, has been denied, and under Rule 40, *X* is not entitled to predicate error upon the ruling.

Illustrations 6 and 7 require further comment. The Rules nowhere state that the physician has any privilege; but it is plain upon analysis that he does. It is, of course, the privilege of the physician, as against the State and against *A*, to obey his duty to *B* not to disclose without *B*'s consent. If, in Illustration 5, *A* sued the physician for damages caused *A* by the physician's not testifying in accordance with the supposed duty to *A* to give evidence in *A*'s suit, *A* could not recover any more than *A* could recover against the patient, whose privilege is expressly stated in the rules. The meaning of the customary statements that "the privilege is the patient's, and not the physician's," and that the patient is the "holder" of it, is that the patient controls both his own privilege and the physician's; not that the physician has none. The patient has the power to terminate them both by waiver. The problem that arises in Illustrations 6 and 7 is how far the physician's privilege extends. When the judge erroneously orders him to testify, does he have a privilege to stand out and test the judge's ruling in a contempt proceeding? It is clear that the patient could do so if he were the witness; and if the physician as witness does so at the patient's urging, the patient's act is privileged, since his privilege is to "prevent" the disclosure. The Rules do not include an explanation on this point; but the commentary preceding Rules 220 to 223 of the Model Code of Evidence, on which Uniform Rule 27 is expressly based, suggests that the physician-witness can stand on his refusal. It states, in discussing the attorney-client privilege:

If the client is neither the witness, nor a party to the action, he must rely, first, upon the judge and, second, upon the witness; if the judge erroneously orders the witness to disregard the privilege and the witness obeys, the client is remediless.<sup>8</sup>

To say that the physician-witness has a privilege as against the State and the litigants to stand out, is not the same as saying that the

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<sup>8</sup> Model Code of Evidence 148 (1942).

witness' duty to the patient extends that far. Particularly in the case in which the patient is not a party and not present, difficult problems arise of reimbursement for the expenses (and perhaps other losses) involved in defending the contempt proceeding. This may have been the reason for saying that if the witness obeys the erroneous order, the holder of the privilege is remediless.<sup>9</sup>

With this groundwork, we are in a position to examine the handling of privilege problems in Ohio. Two things should be noted at the outset. First, probably no state—Ohio included—treats all privileges in exactly the way described in our model. Second, in Ohio, as in most states, privileges are statutory, and the principles described must filter through canons of statutory interpretation before they can exert any effect. The question for Ohio's courts has been what characteristics the legislature has given to the privilege.

Ohio has all the privileges used as examples in the preceding discussion. The Constitution<sup>10</sup> provides that “. . . no person shall be compelled, in any criminal case, to be a witness against himself; . . .” In *Orum v. State*, the accused was being prosecuted for incest with his daughter. He objected to questions put to her by the prosecutor, on the ground that they would incriminate her. The daughter claimed the privilege, and refused to testify until the court ordered her to do so. On appeal from defendant's conviction, the court of appeals reviewed the authorities from other states, found the privilege a personal one, and announced the rule in its third syllabus:

In such a case, if a witness refuses to answer a question on the ground that the answer solicited would incriminate him, and the court disregards the claim of the witness, and requires him to answer, the defendant has no right to object, and it is not reversible error in the reviewing court even if the trial court erred in requiring the witness to answer and the testimony of the witness tended to prove the defendant guilty of the crime charged.<sup>11</sup>

The view has been followed since;<sup>12</sup> and although the Ohio Supreme Court has not met the problem, there seems no reason to doubt that it would approve, since it has spoken of the privilege as being personal

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<sup>9</sup> Ohio cases hold that an attorney or physician may stand on his refusal and test the order to disclose in contempt proceedings or by habeas corpus. *In re Bates*, 167 Ohio St. 46, 146 N.E.2d 306 (1957); *Ex parte Hurin*, 59 Ohio App. 82, 17 N.E.2d 287 (1938).

<sup>10</sup> Ohio Const. art. I, § 10 (1912).

<sup>11</sup> *Orum v. State*, 38 Ohio App. 171, 175 N.E. 876 (1931).

<sup>12</sup> *State ex rel. Simons v. Kiser*, 59 Ohio L. Abs. 113, 98 N.E.2d 322 (Ct. App. 1950); *In re Leiby's Estate*, 60 Ohio L. Abs. 243, 101 N.E.2d 214 (Ct. App. 1950).

to the witness, and since this is the universal mode of handling this privilege.<sup>13</sup>

It can be seen from the *Orum* case that with respect to the privilege against self-incrimination, Ohio's position accords completely with the principles previously stated, as developed in the Uniform Rules. The case could have been substituted for Illustration 2 without changing anything but the name of the privilege.

The Ohio Revised Code, after declaring that all persons are competent witnesses except those too young or too mentally unsound to testify,<sup>14</sup> provides in the next following section under the heading "Privileged Communications and Acts," that:

The following persons shall not testify in certain respects:

(A) An attorney, concerning [communications with his client]; or a physician, concerning [communications with his patient]; but the attorney or physician may testify by express consent of the client or patient, or if the client or patient be deceased, by the express consent of [the surviving spouse or personal representative]; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject . . .<sup>15</sup>

Since the attorney-client and physician-patient privileges are worded identically in the statute, they will be considered together.

*Swetland v. Miles*<sup>16</sup> was a will contest. As a matter of what communications are privileged, the Uniform Rules, the Model Code, and the majority of courts hold that no privilege exists in a case where all parties claim under the same client or patient. The Ohio court's handling of the problem of standing to assert a privilege can, however, be compared with our principles on the assumption that a privilege does exist. The proponents of the will called the attorney of the testatrix as a witness and sought to elicit communications between him and his client. The statute did not then contain the provision for waiver by a representative of the dead client. Whether the attorney claimed the privilege does not appear, but "upon objection," the trial judge refused to admit the communications. On appeal his action was affirmed. The reasoning was that the communication was privileged in nature, that no waiver by the client had been made, and that no one else was authorized by the statute to waive the privilege. There was no discussion of the question who could claim, as distinct from who could waive, the privilege. It can be seen that this case resembles

<sup>13</sup> See *Burke v. State*, 104 Ohio St. 220, 135 N.E. 644 (1922); *State v. Cox*, 87 Ohio St. 313, 101 N.E. 135 (1913). The cases are collected in 8 Wigmore § 2270.

<sup>14</sup> Ohio Rev. Code § 2317.01 (1953).

<sup>15</sup> Ohio Rev. Code § 2317.02 (1953).

<sup>16</sup> 101 Ohio St. 501, 130 N.E. 22 (1920).



Illustration 7, given above in the comments on the Uniform Rules, with two differences. One was the Ohio court's refusal to allow waiver by the personal representative of the deceased client. More important is the position that no claim of privilege by the client's representative or the attorney was necessary to bring the privilege into operation. The position of the Uniform Rules is that absent a claim by the holder or his authorized representative, the privilege should not be recognized. *Swetland* holds that if the existence of the privilege is known to the judge, from whatever source, and there has been no waiver of it, a ruling protecting the privilege is not error. This differs from the method by which self-incrimination is handled, but parallels the Model Code which contained in its Rule 105(e) a provision that the judge could, on his own motion, sustain the privilege of an absent person. The provision was eliminated from the Uniform Rules.

As previously noted, most courts, the Uniform Rules, and the Model Code would not reach the question, because they hold the privilege completely inapplicable in cases where all parties claim under the same client or patient. Given the existence of a privilege, however, the handling of standing to assert in *Swetland* comports with that of most courts and the Model Code.

What Ohio would do when the trial judge erroneously admitted the communication was answered in *Collins v. Collins*,<sup>17</sup> another will contest. Contestant claimed that a codicil, which revoked certain items, had itself been revoked without reviving those items. The principal defendant appears to have been testator's son, who was named executor and as a legatee would receive most of the estate if the original items stood effective. Our statute still did not contain the provision for waiver by the spouse or personal representative of a dead client. All parties thus claimed under the will, the dispute being over what it contained. Contestant called testator's attorney, and over defendant's objection he testified, in effect, to communications from testator. The supreme court held that judgment for contestant should be reversed for this error. It assumed without discussion that defendants could claim the privilege and predicate error on its denial.

The Uniform Rules would render the privilege nonexistent in such a case, but given its existence, the holding in *Collins* is consistent with the Rules' method of handling. The executor was authorized to claim the testator's privilege; he undoubtedly was one of those who objected, and Rule 40 would allow him to predicate error on the ruling refusing recognition. The case parallels Illustration 6. It should be noted that the result would be the same if the statute were treated as

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<sup>17</sup> 110 Ohio St. 105, 143 N.E. 561 (1924).

a rule of exclusion, available to any litigant, and the language of the opinion does not reject that notion.

*Industrial Commission v. Warnke*<sup>18</sup> presented facts calling more clearly for a decision on standing to assert the privilege. In that case, a widow sought workmen's compensation death benefits. The statute still did not contain the provision for waiver by the widow. She offered the testimony of decedent's physician to show his physical condition before and after the accident, and the Commission objected on the ground of privileged communication. The trial court admitted the evidence. The supreme court affirmed the ruling, but it did so by holding that the statute impliedly authorized the widow to waive the privilege and that she had done so. A dissent said that the result was desirable, but was not authorized by the statute's waiver provisions.

It must be counted a misfortune that the question of who may assert the privilege was not fully considered by the court, since application of the principles described would have enabled the case to be affirmed by a unanimous court. Both the Uniform Rules and the Model Code recognize the existence of the privilege in a case like this. It was created for the benefit of the patient and for him alone. The Commission, a stranger to the relationship being fostered, had no interest in it whatever, and no standing to assert it or to claim error on its denial. If control of the privilege did not pass to anyone on decedent's death (as the dissent said power to waive did not), then no one in the case had standing to assert the privilege or predicate error on the failure to recognize it. If control did pass to the widow, as the majority said it did, then only she could claim the privilege and she did not do so. In either event, the Commission was not entitled to claim it, nor to predicate error on the ruling admitting the evidence. The court came to the verge of this position when it said the statute "was intended to shield and protect the patient from disgrace and humiliation," adding, "He cannot be hurt. He is dead." It then quoted approvingly from a Washington case: "It is a universal rule that the question of privilege, with respect to the communications offered in evidence, can be invoked only by the author of the communication. It is a personal privilege."<sup>19</sup> Instead of saying that neither the author of the communication nor any one authorized to act for him had invoked the privilege and thus ending the matter, the majority proceeded to create the hybrid set of relations in which: (1) the patient when alive had a privilege to prevent disclosure; (2) in the absence of waiver, the Industrial Commission, although a stranger to the protected relation,

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<sup>18</sup> 131 Ohio St. 140, 2 N.E.2d 248 (1936).

<sup>19</sup> *In re Thomas' Estate*, 165 Wash. 42, 51, 4 P.2d 837, 841 (1931).

also had a privilege—even a right—to prevent disclosure; but (3) the widow had a power to terminate both the Commission's privilege and right by waiver, and she did so. The court criticized, but did not expressly overrule, *Swetland v. Miles* on the point of power to waive after death of the holder.

The last important case on this line before the statute was amended to authorize waiver for a dead holder of a privilege was *Karcher v. State*.<sup>20</sup> The defendant was charged with committing a criminal abortion. The victim died before the trial. The physician who had treated the victim after the abortion was offered as a witness by the State to testify that the victim had told him she had had an abortion performed upon her. This was objected to by defendant as hearsay and privileged, but the testimony was received by the trial court. The Supreme Court of Ohio reversed, and as an alternative ground of its holding dealt with the physician-patient privilege by saying that "there was no express waiver of the privilege by the patient, and consequently, the admission of the conversation in evidence was clearly prohibited." Taking up the argument that the only person who had standing to assert the privilege or claim error on its violation was the patient, the court quoted Jones, *Commentaries on Evidence*:

The great weight of authority, however, supports the view that the defendant in a criminal prosecution has no right to object to the testimony of a physician, with respect to the victim of the crime, on the ground of privileged communication.<sup>21</sup>

The court then stated:

But where the victim is also a party to the crime, as for example where the victim has consented to an abortion and survives, it has been held that the testimony of the physician who attended her is inadmissible under the rule of privileged communications. In such a case the objection of the accused is valid and must be sustained. *People v. Murphy*, 101 N.Y. 126, 4 N.E. 326, 54 Am. Rep. 661.<sup>22</sup>

The court did not discuss the holdings in other states, more of which are the other way.<sup>23</sup> It concluded by saying that:

. . . [I]n view of the strict terms of our statute, making not only the communication to the physician privileged, but the physician an incompetent witness, this court is of the opinion that the declara-

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<sup>20</sup> 155 Ohio St. 253, 98 N.E.2d 308 (1951).

<sup>21</sup> 5 Jones, *Commentaries on Evidence* § 2200 (2d ed. 1926).

<sup>22</sup> *Karcher v. State*, *supra* note 20, at 260, 98 N.E.2d at 312.

<sup>23</sup> Many decisions are collected in the Annot., 2 A.L.R.2d 645 (1948); 8 Wigmore § 2385; 1 Morgan, *Basic Problems of Evidence* 113 (1954).

tion of Alice Bailey to her physician was incompetent evidence and its admission in evidence constituted prejudicial error.

The choice of the rule of *People v. Murphy* seems unfortunate. The patient was alive at the time of trial in that case, and the court stressed that "the disclosure which tended to convict the prisoner tended to convict her of a crime, or cast discredit and disgrace upon her." In *Karcher* the patient was dead, so that no tendency to convict her of crime or wound her feelings existed, although her reputation could be said to exist and be subject to damage. If so, this damage seems to have been done once and for all when the disclosure was made in the trial court and was not undone by reversing the conviction of someone else in an opinion which set forth the disclosure once more. The court did not repeat its statement from the *Warnke* case, that the holder was dead and could not be hurt. The New York cases held the privilege not claimable by the defendant when the victim was dead, although none of them was a case where damage to the reputation of the dead victim could be foreseen. Within a decade of the *Karcher* case, a lower New York court was able to say that the then law of New York was that if the patient is a party, only he can invoke the privilege; if the patient is not a party, no party can claim the privilege; and that "under no circumstances whatsoever may a defendant invoke his victim's privilege."<sup>24</sup>

The last statement of the *Karcher* opinion, that the strict terms of our statutes not only privileged the communication but also made the physician an "incompetent witness," is of more interest since it wipes out the quotation from Jones' Commentaries. It says that the rule is not merely one of privilege, but one of exclusion, intended to benefit, and assertable by, any litigant. Since the statute does not use the words "incompetent witness," its terms are not as strict as those of statutes which do.

If we compare the "no person shall be compelled" of the privilege against self-incrimination with the "shall not testify . . . but . . . may testify with the express consent . . . ." of this privilege, it is hard for the writer to see clearly why the first wording gives only a privilege, while the other additionally gives all litigants a right to exclude the testimony. Neither piece of legislation says anything about who may predicate error on the denial of the privilege, and the doctrine of Rule 40 represents the common-law rule.<sup>25</sup> Nevertheless, the Ohio

<sup>24</sup> *People v. Preston*, 13 Misc. 2d 802, 176 N.Y.S.2d 542 (Kings County Ct. 1958).

<sup>25</sup> See *Rex v. Kinglake*, 11 Cox Crim. Cas. 499, 22 L.T.R. (n.s.) 335 (Q.B. 1870); *Marston v. Downes*, 1 Adolphus & Ellis 31 (K.B. 1834); *Doe v. Date*, 3 Q.B. 609 (1842); Model Code of Evidence 173 (1942).

court seems to have turned to the view that in the case of these privileges, legislation has made the testimony inadmissible and that any litigant may predicate error on its admission. Prior to *Karcher*, the *holdings* we have discussed produced results fairly close to those which would have been reached under the Uniform Rules, except that the Ohio court, in the attorney-client and physician-patient cases, treated absence of waiver the same way as the Rules treat an authorized claim of the privilege. As soon as the area of self-incrimination was left, however, the language of the opinions changed. They approached the idea that any litigant, even though a stranger to the interest on which the privilege was based, could claim the privilege, and predicate error on its denial. In *Karcher*, with the statement that not only privilege but incompetency to testify was involved, a result was reached completely contrary to what Rule 40 would produce.

The amendment of 1953 to the attorney-client and physician-patient statute expressly gives a power of waiver to specified representatives after the death of the client or patient. Its effect upon some of the cases discussed is apparent; but it does not, of course, touch directly the question of standing to claim the privileges or predicate error thereon, except as it can be claimed to be an implied approval of the rest of the Ohio position because it did not make any other changes.<sup>26</sup>

The privilege for marital communications states that:

The following persons shall not testify in certain respects:

. . . (C) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other during coverture [if the statute's definition of confidential applies] and such rule is the same [after the marriage terminates].<sup>27</sup>

The early case of *Sessions v. Trevitt*,<sup>28</sup> affirming the admission of a communication which under the statute was nonconfidential, described the purpose of the statute:

Communications between husband and wife are not excluded on the ground of their common interest, or for the protection of those against whom they testify, but because public policy requires that they shall not be allowed to betray the trust and confidence which are essential to the happiness of the married state.

This Delphic statement suggests that no person other than the

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<sup>26</sup> This amendment is discussed in Ball, "Waiver of the Attorney-Client and Physician-Patient Privileges," 14 Ohio St. L.J. 432 (1953), reprinted in Fryer, *Selected Writings on Evidence and Trial* 204 (1957).

<sup>27</sup> Ohio Rev. Code § 2317.02 (1953). In criminal cases, see Ohio Rev. Code § 2945.42 (1953).

<sup>28</sup> *Sessions v. Trevitt*, 39 Ohio St. 259 (1883).

spouses has any interest in the privilege; but the statement that it does not exist because of their common interest, if it means something different, might exclude them from control over it as well. This could lead to the conclusion that when a trial judge erroneously refuses to recognize the privilege, the matter is solely between the judge and the State, and no person, not even a spouse who is a party, could predicate error on the ruling.

In *Dick v. Hyer*,<sup>29</sup> a husband and wife executed a cognovit note. Judgment was obtained against both of them on the warrant of attorney. Within term, the wife had this set aside, and filed answer alleging material alteration. There were three trials below. At all of them, apparently, the wife was allowed to testify over the objection of the plaintiff that her husband brought the note to her while they were alone, requested her to sign it, and that when she signed it, it was dated January 5. The instrument sued on read January 4. At the first trial the husband testified that no one had altered the note in any way before his wife signed it. This trial resulted in a mistrial for illness of a juror. By the time of the second trial the wife had obtained a divorce. At this trial they both testified as before. The jury was discharged for inability to agree. At the third trial the wife testified as before, but the husband testified that he had himself altered the date prior to the time his wife signed it. The third trial resulted in verdict and judgment in favor of the wife and against plaintiff, and in favor of plaintiff against the husband.

On appeal by plaintiff, the Ohio Supreme Court held that allowing the wife to testify was reversible error. The question of standing to assert the privilege or of waiver by the holder was not discussed. The knowledge of the note's appearance obtained by the wife was found to be a privileged communication. The court said that her testimony was not "competent," and that if husband or wife is permitted to testify thereto, "the purpose of the statute fails and the confidential relation of husband and wife is imperiled or destroyed."

Here the Ohio departure from the view of the Uniform Rules was complete. Under Rule 28 the husband was the person who had communicated the contents of the note to his wife and therefore the holder of the privilege and the only person having standing to assert it. Even if he did so, which is refuted by the facts, he did not appeal, and by Rule 40, the plaintiff was not entitled to predicate error on the judge's ruling failing to recognize it.

Wigmore comments on the *Hyer* case: "here the privilege is absurdly made to exclude testimony which both husband and wife desire

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<sup>29</sup> 94 Ohio St. 351, 114 N.E. 251 (1916).

to offer, waiving their privilege."<sup>30</sup> Since the parties were divorced, and the admission of the wife's testimony resulted in a verdict in her favor and against him, and since her testimony contradicted the husband's, it is hard for this writer to be so sure that the husband wanted the wife's testimony admitted. On the point of waiver, the husband's testimony at the third trial did not necessarily amount to waiver. He could testify that he changed the date before she signed, without testifying about their communications. However, at the first and second trials, he testified that the date was not altered by anybody before the wife signed it. This testimony would have to cover the time when she looked at it, in order to cover the time until signing. If so, it would seem to be testimony to his communication, and a waiver. A waiver once made is held to be good at least for the proceeding in which it is made.<sup>31</sup>

The simpler reason for criticizing the result in *Hyer* would seem to be the one previously given, since it would not raise the question of the absence from the statute of any express provision for waiver.

The supreme court's next case involving the statute was *Ruch v. State*,<sup>32</sup> a prosecution for perjury. The defendant's ex-wife was called by the State and testified to communications made by him to her during coverture which fitted the statute's definition of confidential. No objection was made by defendant, and no motion to strike or withdraw the evidence. On his appeal from conviction, the court said that he had "waived the provisions of [the privilege statute] in his behalf, and the admission of such testimony under such circumstances will not constitute reversible error." The court did not mention *Dick v. Hyer*, and said it had not met this problem before, but *Ruch* is sometimes described as if it impliedly overruled the "no waiver" result reached in the former case. The court certainly states that the privilege was waived. The holding of *Ruch*, however, requires only the proposition that a litigant, by failing to object, can waive error in applying an evidence rule, whether his standing to complain is as litigant or as holder of a privilege, and whether the rule is one of exclusion or of privilege.

The picture presented by these Ohio cases seems to be this. When the privilege against self-incrimination is applicable, only the holder of the privilege can claim it, and when he is not a party, no party can

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<sup>30</sup> 8 Wigmore § 2340 n.5.

<sup>31</sup> *Pendleton v. Pendleton*, 103 Ohio App. 345, 145 N.E.2d 485 (1957); 8 Wigmore § 2328; McCormick § 97.

<sup>32</sup> 111 Ohio St. 580, 146 N.E. 67 (1924).

make the claim or predicate error on its denial. When any of the other privileges is applicable, any litigant can claim it, and predicate error on its denial, unless it has been waived by its holder. Whether any person not expressly authorized by statute to waive can waive is doubtful, but the dicta of *Warnke* and *Ruch* give an affirmative answer, while the earlier holdings of *Swetland* and *Hyer* give a negative.

Description of the divergence between the Ohio position and that of the Uniform Rules does not explain it; and in the case of Rule 40, which is the common-law rule, it is not easy to explain. Wigmore has suggested that "playing the game" according to the rules may have an influence.<sup>33</sup> If this means reversing the trial judge whenever the judge's mistaken denial of a personal privilege of *A* does harm to the case of *B*, it seems inconsistent not to do so in the case of the privilege against self-incrimination. Neither Ohio nor any other state shows signs of changing that rule.

The Ohio opinions, to the extent that they discuss the matter at all, say that the legislature has made the privileges into rules of competency to be a witness, and thus into rules of exclusion. It is whipping a long-dead horse to point out again that the legislature made only two exceptions to general competency in another section of the Code dealing with competency, and that the privilege section does not use the word competency, nor say anything about changing the common-law rule as to standing to claim a privilege. No one would contend that the words "incompetent to be a witness" should be injected into these privilege provisions because the testimony is unreliable. The chief legislative sanction for the interpretation seems to be the legislature's failure to repudiate it rather than the words of the statute. For Ohio to turn to the common-law rule on standing to claim all privileges, rather than applying it to self-incrimination alone, would require legislative enactment of a provision like Uniform Rule 40.

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<sup>33</sup> 8 Wigmore § 2196, at 112-113. He also mentions "failure to comprehend the issue."